United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,044

LUTHER L. AUSTIN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From The United States District Court
For The District of Columbia

Patrick H. Corcoran
1120 Investment Building
Washington, D. C. 20005

Attorney for Appellant
(Appointed by this Court)

Cr. No. 662-67

Questions Presented

1. Where there was no evidence that appellant fled from the scene of a crime, or after having been accused of a crime which had been committed, and the Government argued flight to the jury in closing argument, was it plain error for the Court to instruct the jury on flight?

2. Was the indictment as to a robbery count fatally defective because it failed to charge the essential element of specific intent?

This case has never been before the United States Court of Appeals for the District of Columbia Circuit.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from conviction for violation under Title 22, Section 502, of the District of Columbia Code and violation under Title 22, Section 2901, of the District of Columbia Code. The United States District Court had jurisdiction to try appellant. This Court has jurisdiction of this appeal under Title 28, Section 1291, of the United States Code.

STATEMENT OF THE CASE

In a two-count indictment filed on June 5, 1967, Luther L. Austin was charged with assault with a dangerous weapon, and robbery. 1/ A jury, on May 7, 1968, returned a verdict of guilty on both counts. By judgment and commitment filed May 27, 1968, appellant was sentenced to a term of from two (2) years to nine (9) years imprisonment on each count, the sentences to run concurrently. The District Court on May 28, 1968, ordered that the appellant be authorized to proceed on appeal in forma pauperis. This court on June 24, 1968, appointed present counsel to represent appellant.

The Offense

About 2:30 p.m. on the afternoon of December 16, 1966, Miss Eva Twinkle Thompson was working alone as a clerk in the Southern Valet Shop at 1400 Fifth Street, N. W. (TR. 28-29). A man entered, requested some clothing, but stated he didn't have a ticket. Miss Thompson told him he would have to return at 5:00 p.m. when someone else would be with her. A customer entered. She waited on him, and noticed a "boy" waiting at the door. After the customer left the man without a ticket again asked about the clothes. She told him he would have to return. He started toward the door, turned around, "pulled"

1/ 22 D.C.C. §502, 22 D.C.C. §2901

a gun, and requested "everything" in the cash register. She opened the cash register, and gave him ten dollars from her coat pocket. (TR. 30-36) The other man, at the door, came behind the counter and took her pocketbook. (TR. 36) Miss Thompson identified the appellant as this person. (TR. 45)

Appellant testified that he arose about 12:30 that day, made a long distance telephone call to his girl friend, and pursuant to a request from his aunt, went downstairs and painted pipes in the kitchen. He painted for 45 minutes, cleaned the brushes for about fifteen minutes, and washed himself. He then cooked some food, afterwards washing the dishes. Thereafter he proceeded to Miss Katherine Bank's house at 1316 Fifth Street, remaining there until about 8:00 or 8:30 that evening. (TR. 94-101, 103)

Events Preceding Arrest

At approximately noon on December 16, 1966, Officer Graham Loundermon, Jr., and Eva Thompson were in an automobile at Plunkett's gasoline station in the 400 block of N Street, N. W. (TR. 40, 51). Luther Austin passed them on his way to a liquor store and Eva Thompson identified him to Officer Loundermon as one of the men who had robbed her. (TR. 40, 52-53, 128-130)

Officer Loundermon testified that he "... got out of the car and proceeded to follow the individual .... east on N Street, where he made a left turn and went north on Fourth Street, after having momentarily went into the whiskey store on the corner ... (TR. 52-53, emphasis supplied). "He went in and he came immediately -- he went in and came right back out .... before I ever got to the store." (TR. 60, emphasis supplied) "Sir, I couldn't swear that the Defendant even went to the store. It looked as if he went to the store. When I got to the door, I opened the door with my left hand and asked them where was the man that just came in, and they said -- (indicating) -- just like this. And I looked and I didn't see anyone anywhere, and there is an alley in the 1300 block of Fourth Street, going west into Neal Street, and I ran up on the bank and I looked around, and I didn't see him anywhere. When I got to Neal Place, some people were pointing and show me in the direction that he went and I was running all the time and I didn't see him until he was at the door on Fifth Street." (TR. 156) "... he ... momentarily went into the whiskey store on the corner, and then continued north on Fourth Street to Neal Place and west on Neal Place, at a rapid pace, into 1316 Fifth Street, Northwest. (TR. 52-53, emphasis supplied)

On his way to the liquor store Luther Austin observed Officer Loundermon and Miss Thompson at the gas station. (TR. 105-106) He knew both of them. (TR. 148-149)[2/] He testified that Officer Loundermon came into the store while he was there and that they both purchased liquor. (TR. 105-106, 129-130, 149-150)[3/] The officer was "substantially" dressed in civilian clothes. (See TR. 156-162) Appellant then left to return to Miss Bank's house and observed Officer Loundermon walking behind him. (TR. 142) He did not think the officer was following him. (TR. 106)[4/]

2/ The officer testified that he did not know appellant. (TR. 155) Miss Thompson testified that she did know appellant. (TR. 39, 46-47)

3/ The officer testified that he did not enter the store and did not purchase liquor. (TR. 154-155)

4/ Miss Thompson's testimony was that she observed the defendant on the street "... and I told Officer Loundermon, there was one of them that had robbed me, and he got out and chased him around the street, and I called for some more policemen to help him." (TR. 40)

Q. "Now, when Officer Loundermon left and followed on foot, was Officer Loundermon running or walking, if you remember?"

A. "I don't remember, sir." (TR. 47)

STATEMENT OF POINTS

The District Court committed plain error when it instructed the jury on flight where there was no evidence that appellant fled from the scene of a crime, or after having been accused of a crime which had been committed, and where the Government argued flight to the jury in closing argument.

The indictment as to the robbery count was fatally defective because it failed to charge the essential element of specific intent.

STATUTES INVOLVED

Rule 12(b)(2), of the Federal Rules of Criminal Procedure (18 U.S.C.A.) provides:

> "Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

Rule 30, of the Federal Rules of Criminal Procedure (18 U.S.C.A.) provides:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Rule 52(b), of the Federal Rules of Criminal Procedure (18 U.S.C.A.) provides:

"Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Title 22, District of Columbia Code, Section 2901, provides:

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years."

Title 22, District of Columbia Code, Section 502, provides:

> "Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years."

ARGUMENT

I. It Was Plain Error to Instruct The Jury on Flight

A. There is no Factual Basis For a Flight Instruction

The Government, in its closing argument, made an emphatic allegation of flight by appellant and an assurance to the jury that the Court would instruct them regarding flight:

> "The police officer followed the man. The man went into a liquor store, that being the Defendant, Mr. Austin, left quickly, according to the police officer's testimony, and disappeared; that he ran.
>
> "If I may digress again, the Court will instruct you on the law of flight. I ask you to pay particular attention to that instruction with respect to this officer's testimony, that the Defendant did in fact run." (TR. 174)

This was reiterated, after refutation by appellant's counsel,[5/] in the Government's rebuttal argument:

5/ "Now I would just like to address my attention at this point to a parenthetical note relating to whether or not the Defendant's travel away from the liquor store on the

"The hasty manner of the retreat that counsel points out, I submit the officer testified the man ran and disappeared. It certainly isn't proof that he is guilty, the fact that the man did run. The Court will instruct you upon the inference that you may draw from flight and concealment, because he certainly disappeared the minute the officer started after him. He ran, according to the officer's testimony." (TR. 196)

The transcript does not disclose a conference between counsel and the Court regarding instructions, nor any

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5/ continued:
morning of the 16th occurred in a hasty manner or not.

"Now, again, it is your recollection of these witness' testimony that is controlling and not mine. However, I have to predicate my argument to you on my fairest and best recollection of their testimony.

"It is my recollection that initially Officer Loundermon testified that the Defendant was walking rapidly away, not that the Defendant was running but that he was walking rapidly away back to Mrs. Banks', and that he, Officer Loundermon, testified in rebuttal he went to the liquor store door, opened the door and asked the individuals inside the store what had happened to the man that had just come in and received in response a piece of body English, so (indicating). He ran, as I recollect he said, to an embankment near-by seeking the Defendant. So Officer Loundermon ran, there is no doubt about it. He had good reason to run.

"My recollection is that Officer Loundermon testified that this Defendant was walking away. Now, whether one walks rapidly or slowly or at a moderate pace is a matter of individual judgment. There is no way we can determine that, the pace at which he was walking. But the testimony is he was walking, not running back to Mrs. Banks'." (TR. 183-184)

specific request by the Government to the Court for an instruction on flight. 6/ The transcript does reveal that immediately upon the conclusion of the Government's rebuttal argument, without conference with counsel, the Court charged the jury. (TR. 197). This charge included the following instruction on flight:

> "One factor you may take into account is whether or not you find that there has been flight or concealment by the Defendant after a crime has been committed. This does not create a presumption of guilt. You may consider evidence of flight or concealment, however, as tending to prove the Defendant's consciousness of guilt. You are not required to do so. You should consider and weigh evidence of flight or concealment by the Defendant in connection with all the other evidence in the case and give it such weight as in your judgment it is fairly entitled to receive." (TR. 205)

It is established that the flight of an accused is competent evidence against him as having a tendency to establish guilt. Allen v. United States, 164 U.S. 492, 499 (1896). But instructions regarding flight should be given with care. See Miller v. United States, 116 U.S.App. D.C. 45, 320 F.2d 767 (1963). Here, the evidence does not support an instruction of flight. Appellant did not flee either from the scene of a

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6/ Other than the allusions made in closing argument and noted above.

crime or shortly after a criminal act had been committed. See Wright v. United States, 116 U.S.App. D.C. 60, 320 F.2d 782 (1963); Edmonds v. United States, 106 U.S.App. D.C. 373, 273 F.2d 108 (1959). The alleged offense occurred some twenty-two hours before Luther Austin was observed by Eva Thompson and Officer Loundermon proceeded to follow him. (TR. 30-31). Nor was appellant confronted and accused of having committed a criminal act. There was no conversation between him and Officer Loundermon. (TR. 130).

And the officer's testimony regarding events that occurred a day after the alleged offense does not establish flight. In this testimony four phrases appear which, at best, indicate movement. Three of these concern appellant's entrance into, and exit from, the liquor store ("momentarily went into;" "immediately ... came right back out"). (TR. 52-53, 60). But the officer testifies that he "... couldn't swear that the Defendant even went into the store." (TR. 156). The remaining intimation is the officer's statement that after appellant left the liquor store he "... continued north on Fourth Street to Neal Place and west on Neal Place, at a rapid pace, into 1316 Fifth Street, Northwest." (TR. 52-53, emphasis supplied). But the officer's subsequent testimony discloses that he did

not see appellant from the time he left the liquor store until "... he was at the door on Fifth Street." (TR. 156). Given every favorable inference, this testimony does not establish flight.

B. The Flight Instruction Was Seriously Prejudicial to Appellant

At the conclusion of the Court's instruction no objection was made by appellant's counsel to the charge on flight. (TR. 212). Failure to record exceptions to the charge might constitute a waiver of the point not raised, 7/ but the Court, in harmony with Rule 52(b) of the Federal Rules of Criminal Procedure, may notice plain errors or substantial defects not brought to the attention of the District Court. Tatum v. United States, 88 U.S.App. D.C. 386, 388-389, 190 F.2d 612, 614-615, (1951). This is appropriate where the giving of an instruction is seriously prejudicial to a defendant. Sherwin v. United States, 320 F.2d 137, 148, (9th Cir. (1963) cert. denied, 375 U.S. 964 (1964); and see Butler v. United States, 115 U.S.App. D.C. 108, 317 F.2d 171 (1963). And when such instruction is on flight where there is no evidence or reasonable inference "... which tends in the least

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7/ Federal Rules of Criminal Procedure, 30 (18 U.S.C.A.)

degree to establish that appellant fled immediately after the commission of the crime, or immediately after he had been accused of a crime that had been committed," a reversal of conviction is required. Morris v. United States, 326 F.2d 192, 195, (9th Cir. 1963).

The danger that the instruction led the jury to indulge in conjecture is aggrevated by the insistent and emphatic (and erroneous) statements concerning flight (and a flight instruction) made by the Government during closing argument. (TR. 174, 196).

Without factual basis, the Government was able to vigorously argue a damning concept, flight, and, have it solemnized by the Court's instruction. Even if counsel for appellant had adhered to Rule 30 of the Federal Rules of Criminal Procedure and objected, it is difficult to conceive of a curing instruction that could have fully cleansed the jury.

II. The Indictment Was Fatally Defective As It Failed to Charge The Essential Element of Specific Intent in Robbery

Appellant was charged in Count One of the indictment with robbery,[8/] in pertinent part, as follows:

8/ 22 D.C.C. §2901

> "On or about December 15, 1966, within the District of Columbia, Luther L. Austin and Jesse L. Little, by force and violence and against resistance and by putting in fear, stole and took from the person and from the the immediate actual possession of Eva T. Thompson, property of William Rush, property in the custody of William Rush, and property of Eva T. Thompson, of the total value of about $178.00, consisting of the following: ...9/

The indictment fails to charge appellant with having any intent to commit the alleged acts, or to having had a specific intent 10/ to permanently deprive Eva T. Thompson or

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9/ The indictment continues to list the property as follows: "... $24.00 in money, property of William Rush, an assorting of clothing of the value of $34.00, property in the custody of William Rush, one purse of the value of $2.00, and one necklace of the value of $30.00, two necklaces each of the value of approximately $15.00, a pair of eye glasses of the value of $49.00, and assortment of cosmetics of the value of $2.00, one cigarette lighter of the value of $2.00, property of Eva T. Thompson."

10/ 22 D.C.C. §2901 does not specifically prescribe as an element of robbery a specific intent to permanently deprive another of his property. However, robbery has been held to be a "species" of "aggrevated larceny," Lamore v. United States, 78 U.S.App. D.C. 12, 136 F.2d 766 (1942); United States v. Mann, 119 F.Supp. 406, 407 (D.D.C. 1954); and larceny is included in the offense of robbery. Lamore v. United States, supra. An essential element of larceny, and therefore of robbery, is a specific intent to wrongfully and permanently deprive the owner of possession of his property. Morissette v. United States, 342 U.S. 246, 260-261, 270-271 (1952). See Hunt v. United States, 115 U.S.App. D.C. 1, 316 F.2d 652 (1963); Mills v. United States, 97 U.S.App. D.C. 131, 228 F.2d 645 (1955).

William Rush of the stated property. [11]

This Court has critically considered a robbery indictment framed in substantially the same language as here and failing to state the element of specific intent. Jackson v. United States, 121 U.S.App. D.C. 160, 161-162, 348 F.2d 772, 773-774 (1965). The Court did not hold that the indictment required reversal as it reversed and remanded on other grounds. But the Court did observe that the indictment left much to be desired in completeness and clarity, that the element of specific intent should be clearly stated, and that the offense charged should be set forth more precisely. Jackson v. United States, supra, at 162 and 774. [12] The indictment in this case fails to meet these criteria.

11/ This issue was not raised in the trial court. But a defective indictment failing to charge an offense because of the absence of an essential element may be noticed on appeal. Rule 12(b)(2), Federal Rules of Criminal Procedure (18 U.S.C.A.); Carlson v. United States, 296 F.2d 909 (9th Cir. 1961); Robinson v. United States, 263 F.2d 911 (10th Cir. 1959).

12/ The indictment in Jackson stated: "... on or about January 30, 1963 within the District of Columbia, Frederick Jackson by force and violence and against resistance, and by sudden and stealthy seizure and snatching, and by putting in fear, stole and took from the person, from the immediate actual possession of Selma J. Nootenboom, property of the value of about $12.95; consisting of one billfold of the value of $2.00 and $10.95 in money."

An indictment must "... fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." United States v. Carll, 105 U.S. 611 (1881). Although an indictment framed in the terms of the statute often will be sufficient, it will be insufficient where, as here, the statute itself does not specify every element of the crime. United States v. Carll, supra; Evans v. United States, 153 U.S. 584, 587 (1894); Moens v. United States, 50 U.S.App. D.C. 15, 267 Fed 317 (1920); Ornelas v. United States, 236 F.2d 392 (9th Cir. 1956). This rule has been applied repeatedly where an indictment, as here, fails to charge a defendant with the intent or knowledge essential to commission of the crime. Moens v. United States, supra; Robinson v. United States, 263 F.2d 911 (10th Cir. 1959); Carlson v. United States, 296 F.2d 909 (9th Cir. 1961).[13]

13/ The danger is not only that appellant was misled as to the offense with which he stood charged, but that the jury was misled as to the nature and elements of this alleged offense.

The Government commenced its opening argument to the jury by reading the entire indictment, (TR. 20-21) then proceeded to assure the jury:

> "The Government intends to prove beyond a reasonable doubt the Defendant is guilty of this indictment as charged by the grand jury.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

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Washington, D. C. 20005

Attorney for Appellant
(Appointed by this Court)

13/ continued:

> "In support of the indictment, the Government intends to present witnesses." (TR. 22)

After a more detailed explanation of the Government's intended case, during which several references were made to the indictment (TR. 22, 23, 25), the Government concluded its opening argument:

> "... but I am quite confident that at the completion of the Government's case, the entire case, when the case is submitted to you for deliberation, the Government will have proven to you beyond a reasonable doubt that this Defendant, Mr. Luther Austin, is guilty of the indictment as charged." (TR. 25)

As in the indictment, so in the opening argument which rests upon the indictment, there is no statement that specific intent is an element of the offense charged. This is the foundation from which the jury heard the case.

To suggest that any misconception which may have influenced the jury throughout the trial was cured by the Court's instructions regarding specific intent is to place a heavy weight on conjecture. (TR. 206, 208).

BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,044

LUTHER L. AUSTIN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
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GREGORY C. BRADY,
ROGER E. ZUCKERMAN,
Assistant United States Attorneys.

Cr. No. 662-67

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ISSUES PRESENTED

In the opinion of appellee the following issues are presented:

1) Did the trial court properly give an instruction on flight and concealment? If not, did appellant sustain prejudice to substantial rights by it?

2) Need this Court consider appellant's challenge to the wording of count one of his indictment? If so, did the indictment properly apprise appellant of the elements of the robbery offense?

This case has not previously been before this Court under this or similar title.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,044

LUTHER L. AUSTIN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a two-count indictment filed June 5, 1967, appellant was charged with assault with a dangerous weapon and robbery, in violation of 22 D.C. Code 502 and 2901. After a trial before United States District Court Judge Gerhard A. Gesell sitting with a jury on May 7, 1968, appellant was found guilty as charged. He was sentenced to concurrent terms of imprisonment from two to nine years.

During trial, the following transpired. Mrs. Eva Thompson, at the time of the offense an employee of the Southern Valet Shop, 1400 - 5th Street, N.W., first testi-

fied. Having worked there for some three years as a clerk, Mrs. Thompson on the afternoon of December 15, 1966 was alone in the store. At about 2:30 p.m. a man entered the store and announced that he wished to pick up his clothing. He had no ticket. Mrs. Thompson advised the customer to return at 5:00 p.m. when her superior would be there. At this juncture, a customer entered and presented a ticket for his clothing. The man who had previously entered advised Mrs. Thompson to wait on the customer with the ticket. Mrs. Thompson then took the ticket and left the front part of the store for his clothing. (Tr. 28, 29, 30, 31, 32.)

Upon returning with the clothing Mrs. Thompson saw a third individual in the store, standing directly inside the front door. That individual was appellant, whom Mrs. Thompson had previously seen in the small shop three or four times before. After the customer just waited on left with his clothing, the man who had entered before and sought clothing without a ticket remained at the counter. He drew a brown revolver and ordered Mrs. Thompson to open the cash register. She complied and gave the gunman some $24.00 (Tr. 33, 34, 35, 36, 39, 45, 47).

Then appellant, still standing at the door, stated words to the effect that "I will get the pocketbook" (Tr. 36, 45). He proceeded to the rear of the counter and took Mrs. Thompson's purse. It contained, among other things, a wallet, a pair of glasses, two necklaces, and a cigarette lighter. Also taken at this time was clothing waiting to be picked up and belonging to one William Rush (Tr. 36, 37, 39, 45). Some ten minutes having elapsed from the moment the first robber entered the store, the two culprits then left (Tr. 39).[1]

The following day, on December 16, 1966, Mrs. Thompson was in a car with Metropolitan Police Department Officer Loundermon. While they were getting gas, Mrs. Thompson saw appellant and informed the officer, "there was one of them that had robbed me." (Tr. 40). The

[1] The gunman, Jesse Little, pled guilty. (Tr. 89).

officer left the car and on foot "chased" the culprit "around the street [corner]." (Tr. 40). Mrs. Thompson then called the police and waited. Thereafter, the same day she received from Officer Loundermon her purse and lighter, identified by her at trial as Government's exhibits 1 and 2. (Tr. 41-42, 43).

The investigating officer, Officer Graham Loundermon, then testified. On December 16, 1966, around noon Officer Loundermon in plain clothes was in Plunkett's Gas Station in the 400 Block of N Street, N.W. After paying the attendant, the officer returned to his vehicle. Upon returning to his vehicle he noticed that Mrs. Thompson, sitting in his car, had a "funny" look on her face. She stated to the officer that the man who had earlier robber her was going east on N Street and identified him to the officer. The identified culprit, appellant, was about twenty feet away at this time. Officer Loundermon then left the vehicle and proceeded to follow appellant on foot. He followed him east on N Street and then north onto Fourth Street. After a brief stop at a liquor store, the officer followed appellant, who walked at a rapid pace, to 1316 Fifth Street, N.W., a house about 100 feet from the scene of the crime. From a nearby callbox the officer radioed for assistance. He then recovered a lady's purse from an adjacent lot in which were papers belonging ot Mrs. Thompson. (Tr. 51, 52, 53, 54, 55). Appellant was thereafter arrested in a second floor room.[2] A window of that room faced the lot in which Officer Loundermon had moments before recovered the purse. Thereafter, at the station house Officer Loundermon recovered a cigarette lighter dropped by appellant on the floor near the seat on which he sat.

The Officer identified Government's Exhibits 1 and 2 as the purse and lighter recovered. Those items were received

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[2] The Officer upon request was admitted to the premises by the owner, a Miss Banks, who stated to him "Search the house if you want to or if you like." (Tr. 64, 67).

in evidence. (Tr. 56, 57, 68). The Government then rested.

For the defense, appellant's aunt, Mrs. Louvinia Rowe, testified that on the day in question appellant arose at noon and began to paint her kitchen. He was so engaged at least until 2:10 at which time she took a nap (Tr. 73, 74). At 4:00 p.m. she came downstairs after her nap and appellant was not there. The painting to be done was completed and the area cleaned up. (Tr. 75).

Appellant took the stand. He testified that an acquaintance, Jesse Little, committed the offense in question and thereafter pled guilty to it. Appellant was at his aunt's house during its commission, painting the kitchen. Appellant conceded that he had purposefully dropped the lighter marked Government's Exhibit 2 after his arrest. He explained that Jesse Little had given it to him at a neighbor's house, the Banks' residence, and after his arrest he judged there might be "something wrong with it" because Little had given it to him "too quick". (Tr. 96, 97, 98, 101, 105, 106, 107, 121). Appellant admitted that he patronized the Southern Valet Cleaners and that Mrs. Thompson knew his face (Tr. 121). He further testified that the day after the offense, while journeying to a liquor store, he saw Mrs. Thompson and Officer Loundermon, the officer in partial uniform, behind him. (Tr. 105-106). The defense then rested.

Officer Loundermon in rebuttal testified that contrary to appellant's earlier assertions, he did not know appellant prior to the day in question nor did the officer purchase liquor at the liquor store into which appellant may have gone when he followed him. (Tr. 154-155). The officer then described in detail the events surrounding appellant's apparent entry into the liquor store and his immediate disappearance thereafter. (Tr. 156).

After closing argument and instructions, appellant was found guilty as charged.

ARGUMENT

I. The trial court properly gave an instruction on flight and concealment. In any event, appellant suffered no prejudice to substantial rights warranting reversal by the instruction about which he now for the first time complains.

Appellant begins with an attack, made for the first time on this appeal, on the trial court's instructions on flight and concealment. He urges the evidence below to have been insufficient to warrant such instruction. We disagree.

First, having raised no objection whatever at trial and having expressed explicitly his satisfaction with the Court's instructions, appellant is foreclosed absent a showing of plain error affecting substantial rights from attacking instructions he now deems erroneous. *Kelley* v. *United States*, 124 U.S.App.D.C. 44, 361 F.2d 61 (1966); *Rivera* v. *United States*, 124 U.S.App.D.C. 99, 361 F.2d 553, *cert. denied*, 385 U.S. 938 (1966); *Williams* v. *United States*, 116 U.S.App.D.C. 131, 321 F.2d 744 *cert. denied*, 375 U.S. 898 (1963). And this burden is particularly a heavy one when the attacked instruction is that on flight and concealment. *Edmonds* v. *United States*, 106 U.S.App.D.C. 373, 379-380, 273 F.2d 108, 114-115 (1959); *Miller* v. *United States*, 116 U.S.App.D.C. 45, 320 F.2d 767 (1963).

We do not think the giving on an instruction on flight and concealment below to have been error at all. Courts have long deemed inferentially probative of the proposition that the accused manifested consciousness of guilt his efforts "to avoid arrest." *Allen* v. *United States*, 164 U.S. 492, 498 (1896). In this jurisdiction, it is well settled that the jury may by inference consider such efforts as probative of that state of mind. See e.g. *Miller* v. *United States*, 116 U.S.App.D.C. 45, 320 F.2d 767 (1963). Chief among efforts to avoid arrest, of course, is flight by the accused from law enforcement officials. See e.g. *Miller* v. *United States*, *supra*; *Hunt* v. *United States*, 115 U.S. App.D.C. 1, 3-4, 316 F.2d 652, 654-655 (1963). Concealment of one's role in a criminal enterprise, as by wiping

clean of fingerprints the scene of the offense or by abandoning the proceeds of the offense, is similarly probative of consciousness of guilt and evidence there directed properly admissible. *Edmonds* v. *United States, supra; Hunt* v. *United States, supra.*

Such evidence was ample below. First, on the day following the offense appellant by his own testimony observed Officer Loundermon, known to him as a policeman, and Mrs. Thompson present at Plunkett's Gas Station (Tr. 105, 106). Officer Loundermon, again in part by appellant's own testimony, was in partial uniform. (Tr. 130).[3] After Mrs. Thompson at a distance of some twenty feet identified appellant, Officer Loundermon began following him. Appellant testified at trial that he was conscious the officer was "behind" him, although he denied then thinking he was being followed (Tr. 106). Appellant thereafter moved at "a rapid pace" (Tr. 53), so rapid, in fact, that Officer Loundermon lost sight of appellant in the area of a liquor store and ran some distance before again catching sight of him. (Tr. 156). We think this allows the inference that appellant actively attempted to allude the officer following him. This is particularly apparent in light of the fact that appellant's movements on the street attracted some degree of attention. Individuals present inside the liquor store where the officer lost appellant took sufficient note of appellant's actions to point out to the officer the direction in which appellant went (Tr. 156). The officer testified that after having run in the direction indicated and having arrived at Neal Place, "some people were pointing and show[ing] me in the direction that he went" (Tr. 156). Appellant's hasty disappearance upon seeing Mrs. Thompson and Officer Loundermon, the latter "behind" him, in conjunction with the attention it attracted and the efforts of the officer by running to keep pace strongly indicate conduct of a sort designed to avoid arrest by flight.

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[3] Appellant testified he wore police pants, sweater and shirt. (Tr. 130). The officer testified the only police item he wore was his uniform belt and gun. (Tr. 156).

Second, evidence below showed that appellant was arrested in an upstairs room of 1316 Fifth Street moments later. Upon arriving at that dwelling shortly after appellant had entered, the officer radioed immediately for assistance. He then recovered a lady's purse from an adjacent lot. The purse contained papers belonging to Mrs. Thompson and was identified by her as the purse taken by appellant. It was found in an area beneath a window of the second floor room in which appellant shortly thereafter was arrested. (Tr. 53, 54, 55, 56). We think this allows the inference that appellant, after arriving in haste at the house on 1316 Fifth Street, attempted to conceal his presence as one of the two robbers of Mrs. Thompson the day previous by disposing of a part of the proceeds, the purse he took from her. He made that disposal by throwing the purse into an adjacent yard from his second story room. Indeed, appellant himself testified, as did Officer Loundermon, that he purposely effected a furtive drop of Mrs. Thompson's cigarette lighter at the station house in an attempt to conceal his possession of it from police (Tr. 107).[4] Such attempts to dispose of the proceeds of the offense constitute a further course of conduct by appellant designed to conceal his role in the robbery the day previous and to avoid arrest.

We think it manifest that the sum total of this evidence —appellant's hasty flight and attempts thereafter to dispose of the goods—allowed the jury, if it wished, to draw the inference that appellant in commission of that flight and concealment was conscious of his participation in the robbery of Mrs. Thompson the day previous. The trial court's instruction on this issue was emminently neutral:

> "One factor you may take into account is whether or not you find that there has been flight or concealment by the Defendant after a crime has been committed. This does not create a presumption of guilt. You may

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[4] Appellant explained that Jesse Little gave him the light "too quick" and he thought there might be "something wrong with it" (Tr. 107). It is apparent the jury was not duty bound to accept this explanation.

> consider evidence of flight or concealment, however, as tending to prove the Defendant's consciousness of guilt. You are not required to do so. You should consider and weigh evidence of flight or concealment by the Defendant in connection with all the other evidence in the case and give it such weight as in your judgment it is fairly entitled to receive." (Tr. 205).

We think it properly given.

And in light of the overwhelming strength of the Government's case, particularly Mrs. Thompson's unequivocal identification of appellant and his concession that she knew him previous and could recognize him, we think appellant is totally unable to demonstrate the instruction, if erroneous at all, to have cause prejudice to his substantial rights. Appellant's response is founded largely on the claim of evidentiary insufficiency on the flight and concealment issue. To this end, he notes only that the officer never directly testified that appellant in his presence ran away. As we have indicated, we think the evidence surrounding appellant's recognition of Mrs. Thompson and the officer thereafter allows the inference that he actively attempted to allude them. Appellant makes no mention of the attention of several passers by his conduct drew nor of the fact that the officer was only able to keep track of his movements by himself running some distance. Nor does appellant at all mention his admittedly furtive attempt to dispose of the cigarette lighter at the station house or the evidence indicating a similar course of conduct with regard to the purse. Rather, appellant contents himself with the assertion that merely because the conduct at issue occurred "twenty-two hours" after the offense, he was rendered immune from an instruction on flight and concealment. (App. Br. 11). We do not understand this to be the law. Attempts "to avoid arrest" may be probative of consciousness of guilt without respect to the closeness in time of the arrest to the offense. Cf. *Allen* v. *United States*, *supra*. Moreover, here the conduct at issue was largely proximate to the offense in time and space, occurring less than a day after and within blocks of the offense.

Appellant's claim that the prosecutor's brief comments referring to his flight are unsupported in the record (App. Br. 9, 13) is for reasons set forth above similarly misguided and is belied by a record revealing amply appellant's hasty and furtive retreat upon sighting the victim and a police officer.

II. The indictment properly apprised appellant of the elements of the offense of robbery.

Appellant, again for the first time, raises the claim that he was inadequately informed by the indictment that specific intent was an element of the offense or robbery with which he was charged and accordingly handicapped at trial. We think this contention is frivilous.

First, appellant challenges only the wording of count one, the robbery count. He leaves unchallenged count two, charging him with assault with a deadly weapon. Convicted on this count as well he received a concurrent sentence of two to nine years. Accordingly, favorable resolution of appellant's contention here will not alter the sentence he faces. In such circumstances, this contention does not require consideration. *Hirabayashi* v. *United States*, 320 U.S. 81, 85 (1943); *Calhoun* v. *United States*, D.C. Cir. Nos. 21,119 and 21,120, decided August 9, 1968, *slip op.* at 3; *Fabianich* v. *United States*, 112 U.S.App.D.C. 319, 302 F.2d 904, *cert. denied*, 371 U.S. 816 (1962).

Notwithstanding this bar, appellant's substantive contention is meritless. The indictment in count one charges the robbery as follows:

> "On or about December 15, 1966, within the District of Columbia, Luther L. Austin, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Eva T. Thompson, property of William Rush, property in the custody of William Rush and property of Eva T. Thompson, of the total value of about $178.00, consisting of the following: $24.00 in money, property of William Rush; an assortment of clothing of the value of $34.00, property

> in the custody of William Rush; and one purse of the value of $2.00, $3.00 in money, one wallet of the value of $2.00, one necklace of the value of $30.00, two necklaces, each necklace of the value of $15.00, one pair of eye glasses of the value of $49.00, an assortment of cosmetics of the value of $2.00 and one cigarette lighter of the value of $2.00, property of Eva T. Thompson."

Appellant now objects that the words "by force and violence and against resistance and by putting in fear, stole and took from the actual possession of Mrs. Eva T. Thompson" fail to state "the element of specific intent" in the crime of robbery (App.Br. at 15). The indictment fairly tracks the words of the statute. No less august body than the Supreme Court has noted in an oft repeated quotation: " 'To steal means to *take away from one* in lawful possession without right with the *intention to keep wrongfully*' " (emphasis in original).[5] That is, the term "steal" imports a specific intention to take property belonging to another and wrongfully to convert it to one's own use. We think that this is dispositive of appellant's assertion that the indictment inadequately charged him with an intent to commit the acts in question. Appellant moreover erroneously asserts that the intent required is that "to permanently deprive" another of property (App.Br. 14) relying on a variety of larceny cases. Such a contention has recently been rejected by this Court with explicitness; ". . . we therefore reject appellant's contention that larceny requires an intent to appropriate property permanently." *Mitchell et. al.* v. *United States*, D.C.Cir. Nos. 20,803, 804, 805, and 806, decided March 18, 1968. Accordingly, we think the indictment as a matter of law sufficiently apprised appellant of the requisite intention in the commission of the offense at issue.

And certainly on the facts of this case appellant cannot claim to have been misguided by the indictment. Appellant's entire defense was alibi, contesting directly the

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[5] *Morissette* v. *United States*, 342 U.S. 246, 271 (1952).

Government's evidence that in conjunction with an armed gunman he took from Mrs. Thompson numerous items. Indeed, appellant, trial counsel and the trial court engaged in a lengthy discussion at the bench during presentation of the defense case at which appellant's trial strategy was thoroughly aired, analyzed and adopted and at which the trial court solicitously advised appellant of the consequences of that strategy (Tr. 110-121). It was never at issue whether the second robber, the one standing near the door, lacked the specific intent to commit the robbery in question. The sole issue was rather whether appellant was that robber. The issue so framed, appellant can hardly claim to have been prejudiced in the manner he now suggests. Moreover, the trial court explicitly instructed the jury on the requisite intent which was required for commission of the offense of robbery as charged in the indictment:

> "And finally, it is necessary that the property was so taken and carried away by the Defendant without the right to do so and with specific intent to steal. At the time of taking and carrying away the property the Defendant must have had the specific intent to deprive the complainant of his property and to convert and appropriate it to the use of the taker." (Tr. 208).

We think this leaves no room for appellant's present speculation that the jury was misled in a verdict of guilty without a finding of the requisite intent (App. Br. at 16, 17). Cf. *Jackson* v. *United States*, 123 U.S.App.D.C. 276, 359 F.2d 260 (1966).[6]

Appellant made no request for a bill of particulars at any stage of the proceedings. He remained silent and

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[6] Appellant cites no cases holding an indictment for robbery to have insufficiently charged the requisite intent by the words "stole and took" by force and violence and against resistance and by putting in fear. Even *Jackson* v. *United States*, 121 U.S. App. D.C. 160, 348 F.2d 772, where the majority questioned this wording, indicated that the indictment "would [not] in itself require reversal."

without any objection to the indictment—an indictment which related with a high degree of specificity the elements of the offense with which he was charged. He met the indictment with a vigorous and studied alibi defense. In the face of an adverse verdict on overwhelming evidence, appellant now claims notwithstanding those circumstances below to have been prejudicially handicapped in preparation of his defense. The record, the law and common sense belie this claim.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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